

Marc Contracting, Inc. and International Association of Heat and Frost Insulators and Asbestos Workers, Local 5, AFL-CIO. Case 21-CA-28619

October 30, 1992

DECISION AND ORDER

**BY CHAIRMANT STEPHENS AND MEMBERS
DEVANEY AND OVIATT**

Upon a charge filed by the Union on April 13, 1992, and amended on May 20, 1992, the General Counsel of the National Labor Relations Board issued a complaint on June 30, 1992, against Marc Contracting, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent has failed to file an answer.

On September 15, 1992, the General Counsel filed a Motion for Summary Judgment.¹ On September 17, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all the allegations in the complaint shall be considered to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that the counsel for the General Counsel, by letters dated September 2, 1992, notified the Respondent that unless an answer was received by September 10, 1992, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California corporation, with an office and place of business in Walnut, California, has been engaged in the construction business. During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations purchased and received goods and products valued in excess of \$50,000 from other enterprises located within the State of California, each of which other enterprises had received these goods and products directly from points outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of Respondent (the unit), constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All mechanics, mechanic-foremen, mechanic/general-foremen, and apprentices employed by Respondent; excluding all other employees, office clerical employees, guards, watchmen and supervisors as defined the Act.

Since on or about May 22, 1987, and at all material times, the International Association of Heat and Frost Insulators and Asbestos Workers, Local 5, AFL-CIO, has been the designated exclusive collective-bargaining representative of the unit and since then the Union has been recognized as the representative by the Respondent. This recognition has been embodied in a collective-bargaining agreement which was effective from May 22, 1987, to September 9, 1988.

At all times since May 22, 1987, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since the expiration of the collective-bargaining agreement the Respondent has adopted the terms and conditions of employment set forth in successive collective-bargaining agreements between the Union and the Southern California Chapter, Western Insulation Contractors Association. The first such collective-bargaining agreement was effective for the period September 10, 1988, to September 22, 1991. The second such collective-bargaining agreement is effective for the period September 23, 1991, to September 18, 1994 (the current agreement).

Since on or about October 18, 1991, the Respondent has changed the terms and conditions of employment

¹ The Charging Party Union filed a statement in support of the General Counsel's motion on September 29, 1992.

of its employees in the unit by its failure to pay contributions to the health and welfare fund, pension program, apprenticeship program fund, national apprenticeship fund, and occupational health plan, as set forth in the current agreement.

Since on or about October 18, 1991, the Respondent has changed the terms and conditions of its employees in the unit by its failure to abide by the savings plan as set forth in the current agreement, in that a percentage of the employees' wages were withheld from their pay, but the withheld wages were not deposited into individual employee bank accounts.

Since on or about October 18, 1991, the Respondent also changed the terms and conditions of employment of its employees in the unit by its failure to remit to the Union dues deducted from employees' wages.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has unlawfully failed since October 18, 1991, to make contractually required payments for health and welfare, pension, apprenticeship, and occupational health funds, we shall order the Respondent to make whole its unit employees by making all payments that have not been made and that would have been made but for the Respondent's unlawful failure to make them, including any additional amounts applicable to such delinquent payments as determined in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make such required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in

Ogle Protection Service, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, having found that the Respondent has unlawfully failed since October 18, 1991, to deposit withheld wages into individual employee bank accounts as required by the contractual savings plan, and to remit to the Union dues deducted from employees' wages as required by the current agreement, we shall order the Respondent to return to its unit employees all such withheld wages that have not been deposited and to remit to the Union all such deducted union dues that have not been remitted, with interest as prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Marc Contracting, Inc., Walnut, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to pay contributions to the health and welfare fund, pension program, apprenticeship program fund, national apprenticeship fund, and occupational health plan, as set forth in the current agreement.

(b) Failing to abide by the savings plan as set forth in the current agreement, by failing to deposit withheld wages into individual employee bank accounts.

(c) Failing to remit to the Union dues deducted from employees' wages, as required by the current agreement.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the unit described below with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment:

All mechanics, mechanic-foremen, mechanic/general-foremen, and apprentices employed by Respondent; excluding all other employees, office clerical employees, guards, watchmen and supervisors as defined the Act.

(b) Make all required contributions to the health and welfare, pension, apprenticeship, and occupational health funds that have not been made since October 18, 1991, and make the unit employees whole for any losses they may have suffered as a result of the failure to make such payments, as set forth in the remedy section of this decision.

(c) Return to the unit employees all wages withheld from their paychecks but not deposited into their individual employee bank accounts since October 18, 1991, plus interest.

(d) Remit to the Union all dues deducted from unit employees' wages but not remitted to the Union since October 18, 1991, plus interest.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(f) Post at its facility in Walnut, California, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to pay contributions to the health and welfare fund, pension program, apprenticeship program fund, national apprenticeship fund, and occupa-

tional health plan, as required by our current collective-bargaining agreement with International Association of Heat and Frost Insulators and Asbestos Workers, Local 5, AFL-CIO.

WE WILL NOT fail to abide by the savings plan as set forth in the current agreement, by failing to deposit withheld wages into individual employee bank accounts.

WE WILL NOT fail to remit to the Union dues deducted from employees' wages, as required by the current agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the unit described below with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment:

All mechanics, mechanic-foremen, mechanic/general-foremen, and apprentices employed by us; excluding all other employees, office clerical employees, guards, watchmen and supervisors as defined the Act.

WE WILL make all required contributions to the health and welfare, pension, apprenticeship, and occupational health funds that have not been made since October 18, 1991, and make the unit employees whole for any losses they may have suffered as a result of the failure to make such payments.

WE WILL return to the unit employees all wages withheld from their paychecks but not deposited into their individual employee bank accounts since October 18, 1991, plus interest.

WE WILL remit to the Union all dues deducted from unit employees' wages but not remitted to the Union since October 18, 1991, plus interest.

MARC CONTRACTING, INC.